161 Ga. App. 763
STATE of Georgia, Appellee
v.
FRANK JOSEPH SACCHINELLI, Appellant
No. 63077 and 63078
Supreme Court of Georgia
March 9, 1982
Rehearing Denied March 23, 1982
Application for Certiorari Denied April 21, 1982
Application for Rehearing Denied May 18, 1982

SHULMAN, Presiding Judge

On May 6, 1980, Appellants were arrested at the Bartow County Airport after arriving there in a small airplane. Seized at the time of the arrests were the aircraft, twenty-nine $100 bills, and 995 pounds of marijuana. In Cases No. 63077 and No. 63079, Appellants seek reversal of their subsequent convictions for possession of marijuana with intent to distribute. In Case No. 63078, Sacchinelli seeks reversal of the order of the Trial Court condemning the airplane and the money pursuant to a libel filed under the provisions of Code Ann. § 79A-828.

1. Both Appellants filed motions to dismiss and motions to suppress all the evidence seized on the night of their arrests. The basis of those motions was certain alleged illegalities in the course of the investigation which led law enforcement agents to the Bartow County Airport. The primary complaint concerning the conduct of the investigation involves the use of a sham subpoena to seize messages taken for Sacchinelli by a telephone message service with which Sacchinelli had contracted. In addition, both Appellants argue that an affidavit submitted in support of a petition for an electronic surveillance (wiretap) warrant contained deliberately false statements.

Our review of the record reveals that Appellants' objections to the investigatory methods of the Cobb County Police are apparently well founded. It appears that the Cobb County Police used subpoenas issued in false names and containing language which

appears likely to intimidate witnesses into remaining silent about the receipt of such subpoenas. It further appears from the record that some of the statements in the affidavit submitted in support of the request for a wiretap warrant were false; whether they were deliberately false is not so clear. However, the misconduct of the Cobb County Police and the apparent involvement of the Cobb County District Attorney in that misconduct, though reprehensible, do not require a reversal of Appellants' convictions. The reason for our decision is the same reason articulated by the Trial Judge; there is sufficient evidence to warrant a conclusion that the arrest of Appellants and the seizure of the contraband stemmed from independent sources and was not tainted by the dubious methods of the Cobb County authorities. See Wong Sun v. U.S., 371 U.S. 471 (83 S.C. 407, 9 L.E2d 441). Although there is evidence to support Appellants' argument that their arrest stemmed directly from the information gained through an abuse of the subpoena power and by a wiretap based on allegedly false swearing, there is also sufficient evidence from which the Trial Judge could conclude, as the Trial Judge in this case did conclude, that there were separate and untainted sources of information which could and did lead the police to Appellants. In a Motion to Suppress, the Trial Court is the finder of fact and its findings will not be disturbed unless clearly erroneous. McDonald v. State, 156 Ga.App. 143, 146 (1) (273 S.E.2d 881). We conclude, therefore, that since there was evidence from which the Trial Court could find that the arrest of Appellants was not tainted by the alleged police misconduct, there was no error in the denial of Appellants' Motions to Suppress the evidence seized at the Bartow County Airport. For the same reason, we find no error in the Trial Court's refusal to dismiss the Indictments for governmental misconduct.

2. Both Appellants have enumerated as error the Trial Court's refusal to give a requested jury instruction on the lesser offense of possession of less than one ounce of marijuana. The request was based on evidence that a small quantity of marijuana seeds was found in the aircraft on which Appellants arrived at the Bartow County Airport. Under all the circumstances of these cases, we conclude that the evidence did not require that the requested charge be given.

The evidence showed that the law enforcement agents involved in these cases gathered at the airport because they suspected that Appellants might arrive with a quantity of contraband. After darkness fell, the airplane with Appellants aboard landed. It taxied to the end of the runway and stopped. The law enforcement agents watching were unable to ascertain what was transpiring at the end of the runway. Then, the airplance taxied to the hanger area, whereupon Appellants were arrested. An agent dispatched to the end of the runway reported that there had appeared there a pile of bales of marijuana, a pile that had not existed before nightfall. At trial the State introduced, as part of the circumstantial evidence that Appellant had placed the bales of marijuana at the end of the runway, evidence that less than one ounce of marijuana seeds were swept from the floor of the aircraft. We cannot agree with Appellants that that evidence authorized a jury charge on the lesser offense of possession of one ounce of marijuana. If the evidence of the smaller quantity was submitted as evidence of another crime, it was inadmissible. Dunkum v. State, 138 Ga. App. 321 (10) (226 S.E.2d 133). Here, however, the evidence was submitted solely for the purpose of linking Appellants to the large pile of marijuana; it cannot be seen merely as evidence of a lesser crime. If one believes that the marijuana seeds came from the aircraft on which Appellants arrived, the same aircraft which sat at the end of the runway were the 995 pounds of marijuana were found, then the conclusion that Appellants placed the large pile of marijuana at the end of the runway is inescapable. There was no error in denying Appellants' requested charge.

3. Appellants made a timely challenge to the composition of the Grand Jury list and the petit jury list in Bartow County. They enumerate as error the Trial Court's overruling of their challenge to the petit jury list. We find no such error.

Although Appellants have shown that there is a numerical discrepancy between the percentage of the age-eligible population which is female and the percentage of the jury list which is female, they did not make out a prima facie case of unconstitutional underrepresentation of women on the jury list. See Pass v. Caldwell, 231 Ga. 192 (1) (200 S.E.2d 720). Here, as in Cochran v. State, 155 Ga. App. 418 (271

S.E.2d 864), Appellants showed no more than the numerical disparity. There was no showing at all that the primary source of the jury list, the voter registration list, was gender biased. Indeed, the evidence adduced on the hearing of Appellants' challenge demonstrated that the jury commissioners had made a good faith effort to meet the responsibility laid upon them by Code Ann. § 59-106: to "select a fairly representative cross section of the intelligent and upright citizens of the county . . . "

4. While the law enforcement agents were detaining Appellants long enough to check the far end of the runway, one officer frisked Appellant Parker. That officer testified that he felt a large, hard metallic object in Parker's pocket and removed it to ascertain whether it was a weapon. Parker insists that the frisk was not warranted by the circumstances and that the object should have been suppressed. The importance of this issue to Parker is that the object was the cap of a removable aviation fuel tank found at the end of the runway with the 995 pounds of marijuana and, thus, provided a very concrete link between Parker and the contraband.

We hold without hesitation that the Trial Court was correct in refusing to exlude the cap from evidence. There were certainly circumstances from which the officer could conclude that criminal activity was afoot and the situation was such that the officer might very reasonably have been concerned that weapons were present. The holding of the U.S. Supreme Court in Terry v. Ohio, 392 U.S. 1 (88 S.C. 1868, 20 L.E2d 889), authorized the very limited intrusion made by the officer in this case.

5. Following the guilty verdicts, the Trial Court verbally announced Sacchinelli's sentence to be 10 years, 9 to serve and 1 on probation, the probation being conditioned on payment of a $10,000.00 fine. As reduced to writing and signed by the Trial Judge, the sentence provided for the same term, but permitted Sacchinelli to enter upon probation immediatley upon his release from prison and to pay his fine in monthly payments of $1,000.00, commencing 30 days after his release from prison. The next day, a new sentence was filed, purporting to be an amendment to the first. The new sentence provided that the fine had to be paid in lump sum as a condition precedent to probation and added the

condition that Sacchinelli not operate an aircraft in Georgia. The entry of that second sentence is enumerated as error, and we are compelled to agree with Sacchinelli's argument on this issue.

" 'Once a person has entered upon the execution of his sentence, the Court is without power to change it by increasing the punishment. This is considered a violation of the Fifth Amendment prohibition against double punishment or jeopardy. (Cits.)' " Brown v. Moody, 243 Ga. 473 474 (254 S.E.2d 853). As it was in Brown, the next-day amendment of the sentence was erroneous. The Trial Court is directed to vacate the second sentence and reinstate the first.

6. In Case No. 63078, Sacchinelli raises two objections to the forfeiture of the aircraft seized at the time of his arrest. The first objection concerns the Trial Court's dismissal of the motion to intervene filed by a party asserting an interest in the aircraft. The Trial Court initially permitted the intervention, but later dismissed after the intervenor failed to appear at a hearing. However, the merits of the intervention and of the dismissal aside, we fail to find any standing in Sacchinelli to raise this objection. Sacchinelli has consistently denied ownership of the aircraft. If, as he asserts, he had no ownership interest, we fail to see how he is prejudiced by the Trial Court's action, including the forfeiture.

Sacchinelli's second objection is that the evidence did not warrant the forfeiture. Under the provisions of Ga. Code Ann. § 79A-828, an aircraft is subject to forfeiture if it has been used to transport marijuana. The evidence in this case is overwhelming that the aircraft was so used. Also forfeited was $2,900.00 found on Sacchinelli's person. The circumstantial evidence in this case was sufficient to authorize the Trial Judge to conclude as he did that the funds were present to facilitate the drug transaction in which Appellants were involved at the time of their arrest. The requirements of the statute were met and there was no error in the forfeiture.

Judgments affirmed in Cases No. 63078 and No. 63079. Judgment affirmed with direction in Case No. 63077. Birdson and Sognier, J.J., concur.

MR. CRAWFORD:

actually apprehended and stopped them?

MR. PHILLIPS:

A Any additional?

Q Yes, sir.

A Not that I recall.

Q All right, did you at any later date receive any information from Hallman?

A. Yes, sir, After I had detained the suspects and patted Mr. Sacchinelli down for a weapon I left him in the presence of the Customs Officers and members of the Bartow County Sheriff's Office. They were there at the plane with Mr. Sacchinelli and Mr. Parker. I walked back up to the position beside sunbelt Helicopters approximately a hundred and fifty yards away, and I got back in radio communication with Detective Hallman, and he advised me of the suspects -- that they had deposited narcotics off the side of the runway, and I walked back down and placed them under arrest.

Q Do you know what the time period was from the time you first stopped them, patted them down, until

you went back and arrested them?

A Yes, sir about -- approximately five minutes.

Q Why did you leave the Defendants in the custody of the Customs Agents and walk and call Hallman and then come back?

A Well, I suspected -- The Customs officers was, I believe, John Roberson was talking to Mr. Sacchinelli about the aircraft, his departing the United States and as to the ownership of the

MR. PHILLIPS:

A No, sir.

MR. JENKINS:

Q. That is not something you would have in your case report?

A That I got the information from Mr. Padgett? No, sir, I don't have that in my case report.

Q You don't have anything in your case reports about any confidential informer, is that right?

A That is right.

Q You have nothing about that informant in your case report?

A Not that I recall at this point in time.

Q Is there anything else, any information that was received from this confidential -- It is a confidential informant, isn't it?

A I don't know who the subject is.

Q You don't know who it is?

A No, sir, I don't.

Q Is there anything else you received from that individual by way of Mr. Padgett? Were you told anything else that was received from that individual?

A Well, I'm not sure Mr. Padgett knows who the individual is either. Are you asking me have I got

any information from Mr. Padget from any other individual? How could I distinguish?

Q No, sir, I'm asking you -- You have testified there was some information in your hand the night that Mr. Parker was

MR. JENKINS:

Q Anything else?

MR. PHILLIPS:

A I think I told him to, "Halt" two or three times.

Q Did he keep on moving?

A Yes, he kept on moving. He moved several feet from the first time I told him to halt.

Q Then you told him to halt again?

A Yes, sir.

Q And he did?

A Yes, sir.

Q Did you have your gun pointed at him?

A Yes, sir.

Q Where was Mr. Parker at this time?

A He was inside the aircraft at the pilot's controls.

Q What exactly was done relative to him?

A I told him to put his hands in the air.

Q And how did you speak -- Was the door to the plane open?

A Yes, sir.

Q You just hollered at him, "Put your hands in the air."

A Yes, sir.

Q You pointed your gun over in that direction?

A Yes, sir.

Q Did he comply with that?

A Not immediately.

Q What did he do?

MR. PHILLIPS:

A In my office.

MR. JENKINS:

Q Where is your office?

A Cobb County.

Q You did not bring the inventory list or your file with you today?

A No, sir.

Q What is on the inventory list? What did you find in the airplane?

A We found marijuana residue. We found a coffee thermos with two crumpled rolls of paper in it. We found a notebook with several sheets of paper in it. We found maps in the aircraft.

A What type of maps? Any significant ones?

A I think they are maps of the whole Southeastern United States, Florida, South Florida, the Islands, possibly South Cacas, Columbia, Venezuela.

Q The Carribean Islands?

A Yes.

Q The crumpled paper, did they have any writing on them?

A Yes.

Q Did the note book have writing in it?

A I can't recall if the notebook had writing in it or not. It had paper in it.

Q What else, if anything, did you find in that airplane?

A I found a piece of wood in the airplane, found a part of a gas pump in the airplane.

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(Phillips Testimony Cont'd)

Q What piece of wood? What was it? Just a hunk of wood?

A Just a hunk of wood. It looked like it was part of a tree trunk.

Q A gas pump?

A The nozzle of a gas pump, various refreshments.

Q Food?

A Yeah, food, bottles of grape juice, I believe, empty bottles, cans, cigarettes. I noticed a nozzle on the passenger side for a fuel line.

Q How much marijuana residue?

A A small quantity.

Q Did you save it?

A Yes.

Q Was it bagged separated and marked?

A Yes, sir, it was bagged separately and marked from the area of the plane that it was recovered from at the Crime Lab.

Q Did you conduct this inventory before or after the arrests?

A Before.

Q Did you file an inventory with anybody?

A Yes, sir.

Q Who?

A Property control, Cobb County Police Department.

Q When did you do tht?

A I believe it was May the 7th.

MR. MARGER:

Q This DA's office or Mr. Martin's office?

MR. SISSON:

A The Cobb County's DA office.

Q Who did you secure it form?

A I went to the DA's office on this particular day with the information that I had been supplied and requested that this subpoena be issued.

Q Who did you speak to?

A It would be one of the -- I approached one of the secretaries in the DA's office with this information.

Q Which secretary?

A It has been so long ago I honestly do not remember.

Q Did the secretary issue the subpoena?

A The secretary type the subpoena up.

Q At your direction?

A All I supplied was the information and told her that I need the subpoena.

Q Are you telling me that the verbients used in this was put in by a secretary?

A The way it was worded. I did not sit down and dictate what was to go in this subpoena, no.

Q Who did? Was it one of the Assistant District Attorneys?

A Honestly I don't know.

Q So you remember going to the District Attorney's office, speaking to a secretary and getting this subpoena. Do you --

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(Sisson Testimony Cont'd)

A The secretary returned the subpoena to me.

Q Did she say she had spoken to anybody in the DA's office about it?

A I did not ask her.

Q Was the secretary at the first desk, second desk, third desk?

A I honestly don't remember.

Q Are you sure that Karen Conner did not type the subpoena for you?

A No, she did not type the subpoena for me. At that particular time I was not working in the same office with Karen Conner, that she was working at.

Q Had you ever seen a subpoena before which directed to anyone other than the telephone company and requested them not to disclose the existence for

ninety days to anybody?

A I had not really dealt with serving subpoenas on too many people.

Q Who are you working with in the Sacchinelli case?

A I haven't worked on the Sacchinelli case.

Q Who told you to get the subpoena?

A This information was derived because of the involvement that I had in investigating another case. When I approached Northwest Answering Service I did not have the slightest idea in the world that the information that I was asking initially from Ms. Bryant was on Sacchinelli -- that I would be receiving

set before?

A I don't know that either, sir.

Q You know it was not set before any Judge, do you not, sir? There was no case. There was no case number, there was no file. The reason that this subpoena --

A There was definitely a case that we were working on. There was a reason for the issuance of this subpoena.

Q Are you telling the Court that you have a right to issue a subpoena?

A I did not issue the subpoena.

Q Are you telling the Court that there is a subpoena that can be issued that is not returnable either before a Grand Jury or before a Judge?

A No, I'm not saying either.

Q Well, you know at the time nobody had authority to issue this subpoena, did you not?

A I have stated how I got the subpoena.

Q So it is the DA's fault?

A I'm not saying that.

Q And you knew Ike Smathers was not a person who was involved in any case or any case number.

A I knew Ike Smathers did not exist, yes.

Q And you knew the case did not exist as far as the Courts were concerned, did you not?

A I fail to understand what you are getting at.

on any other citizen of this country?

A Have I issued?

Q Yes, how many have you gotten and delivered?

A I have not issued any.

Q Does Mr. Pierce know about this when this went out?

A No.

Q What did you do with the information that you got? Where is it now?

A The information that I obtained was turned over to the special investigations section of the Cobb County Police Department.

Q Was it used in any event in regard to Mr. Sacchinelli, to your knowledge?

A To my knowledge, I can't state. I do not know.

Q But you turned it over to whoever was dealing with the normal routine of drug and smuggling cases in your agency?

A Yes.

Q Would you issue another subpoena like that again, sir, right now?

A No.

Q Why not?

A Basically, the Ike Smathers --

Q Because you know it is an illegal subpoena, don't you?

A I don't know, basically, I don't know whether it is illegal or not. Any subpoena that I would issue at this point

MR. MARTIN: Again, the same. Can you limit that?

Q (by Mr. Marger) From Cobb County?

MR. MARTIN: Thank you.

A At the time that this subpoena was issued, basically a group was under the direction of Tom Charron.

Q (by Mr. Marger) You are not telling me that Mr. Charron personally authorized the issuance of the supboena like this, are you? Is that what you are saying?

A I am saying that I went to the DA's office, supplied them with the information, and a subpoena was supplied to me.

Q Did Tom Charron know anything about the issuance of this subpoena to your knowledge?

A Not to my knowledge. I did not see him okay the subpoena or --

Q Did you walk into that office and wait for the subpoena to be typed?

A I walked in the office, supplied the information.

Q You supplied the name of the case, did you not, The State of Georgia versus Ike Smathers?

A No, I did not.

Q Where did that come from? The secretary?

A It may have come from the secretary, but I did not ask for a State of Georgia versus Ike Smathers subpoena.

Q As a result of this subpoena, whoever issued it, you

MS. CONNER:

A Yes, sir.

MR. MARGER:

Q Ma'am, let me switch these. I show you Defendant's Exhibit marked D-1 and ask you what that is if you know.

A It is a subpoena.

Q Have you ever seen it before?

A I can't say that I have. I probably have.

Q If it was the testimony that Mr. Phillips that you prepared that subpoena would he be accurate?

A According to this date, on the 27th of September, 1979, I don't believe that I did.

Q You say you did not prepare it then?

A No, sir, I don't believe that I did.

Q Just one moment. I'm sorry. I showed you the wrong subpoena.

MR. MARGER: May I have D2, please?

Q (by Mr. Marger) Ma'am, I show you Defendant's Exhibit D-2 and ask you what that is if you know.

A A subpoena.

Q Do you recognize that subpoena?

A Yes, sir.

Q Did you prepare that subpoena?

A Yes

Q Under whose authority?

A District Attorney of Cobb County.

Q Who gave you specific information to prepare that

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subpoena?

A Mr. Tom Charron.

Q You called him and asked him if you might prepare it?

A I have his permission to do -- in fact, his instructions to issue these subpoenas.

Q Who is Ike Smathers?

A John Doe.

Q And in what case was that subpoena issued in?

A In reference to Mr. Sacchinelli.

Q Is that subpoena to the Grand Jury of Cobb County?

A That I don't know.

Q Is that subpoena issued in regard to an ongoing numbered case in Cobb County?

A I don't know what you mean by numbered case.

Q Well, is that actually a case in which information has been filed, an Indictment filed against Mr. Sacchinelli or anybody else?

A It is an ongoing investigation.

Q So that is an investigative subpoena?

A Yes.

Q And you had authority delegated to you from Mr. Tom Charon in regard to Mr. Sacchinelli?

A In regard to subpoenas.

Q So that if you are investigating Mr. Jones or Mr. Smith or whoever you could prepare such a subpoena under the

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authority of the District Attorney's office?

A Yes, sir.

Q And in this case you prepared this subpoena?

A Yes, sir.

Q At whose request?

A At Sgt. Phillips' request.

Q Who dictated to you, if anybody, the paragraph number 3. "You are not to disclose the existance of this request for a period of ninety days from the date of this request."

A It was not dictated.

Q And where did you get that language?

A From the District Attorney's office.

Q He told you to use that?

A Yes.

Q Mr. Charon did?

A Yes, sir.

Q And who gave you permission or told you to include: "Any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law?"

A The District Attorney, Mr. Tom Charon.

Q Where did you secure the date of that hearing, the date of the hearing shown on the subpoena?

A We normally give a week to ten days to the companies to receive the information -- to prepare the information.

Q Did you give a week to ten days in this case?

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A No, sir.

Q How many days did you give?

A Two.

Q Now, that case was set for Courtroom "B" on the 30th day of May at 3:00 o'clock?

A Yes, sir.

Q Was the hearing on that date?

A I do not know.

Q Did you advise the Clerk of the Court that you had issued a subpoena for that date?

A I gave the District Attorney's office copies of all subpoenas that we issue.

Q How did you select the date upon which the hearing will be held?

A I don't do that.

Q Where did you get the date from?

A I just make it up.

Q Just make up a date.

A No, that's incorrect. I don't make up a date. I --depending on how soon we tell we need the information, we choose a date, and we try to be fair to give enough time for the information to be received.

Q So that a subpoena served, for example, at 9:00 o'clock on the date when you have the date set for 9:30 the same day that, no doubt, would be fair?

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A Would you repeat the question?

Q Yes, ma'am. If a subpoena were served by the police department at 9:00 a.m. on the day that the hearing was set for 9:30 a.m. the same day, that would be fair?

A Depending on the circumstances.

Q In other words, a half hour notice would be depending upon what circumstances?

A How far away the company was or where the information was coming. I would not assume that to

be fair though.

Q You would not assume that to be fair?

A No, not thirty minutes.

Q But two days is fair?

A Sure.

Q Now I ask you again what you do once you put a date on the subpoena; for example, in D-2 you had a date there. Who else did you notify of that date other than the person that was the recipient of the subpoena?

A The District Attorney's office receives a copy.

Q Received a copy of the subpoena?

A Yes.

Q Who did you send the copy to?

A Whoever picks up the mail and transports it over to the District Attorney's office.

Q So you prepare a second copy, you put it in a box?

A (Nods head yes).

MR. CUSTER:

was not to disclose the existence of the request to anybody, and she assumed anybody meant her lawyer.

MR. MARGER:

Q Why did she contact you sixty days later when it says ninety days?

A I think she had become concerned about it. She and I had had some conversations. I had represented the lady in various things for -- I don't know -- twelve, fifteen years, maybe longer, and we have had some discussions concerning confidentiality of her records and in her role, and we discussed that as a result of that conversation, and I think that is probably what prompted her coming to see me anyway.

Q Did she indicate to you any other reason why she had not spoken with you other than the fact that it said in there that she should not tell anybody?

A Well, I think basically that was it. I think probably she was somewhat frightened and impressed with the -- shall we say the majesty of the law and

the effect of a subpoena issuing in a case.

Q Now I shall you Defendant's Exhibit marked D-2 and ask you, sir, if you have ever seen the Exhibit marked D-2 before?

A Yes, sir.

Q And upon what occasion did you see that?

A As a result of the first conversation, the one in November, I advised Ms. Bryant that if she received any further

MR. CUSTER:

was advised that there was none. I then went to the District Attorney's office. I believe I saw Mr. Martin there and said that we were responding. I didn't think that, apparently, there was no hearing and that I would be objecting to anything and asked him if there was a hearing, and apparently there was not.

MR. MARGER:

Q Did Mr. Martin indicate any reason why there wasn't a hearing?

A No, not really.

Q Did he display any emotion whatsoever about this situation?

A I received a pleasant smile from him. I don't know if it was just friendliness or what, but I've had a very pleasant relationship with him. It could have been simply that. Then I just took everything and went back to my office and forgot about it.

Q And never again was the evidence requested?

A Not in this context, no.

Q Did you ever receive another subpoena in the Ike Smathers case?

A Yes.

Q And do you happen to have that subpoena with you, sir?

A Yes.

Q Before I get into this one, Mr. Custer, I show you two originals which you brought to me and ask you to look at

MS. BRYAN:

A A subpoena.

MR. MARGER:

Q When is the first time that you saw the original of that subpoena if you can recall?

A When it was served on me on the 27th day of September, 1979.

Q Do you know an Ike Smathers?

A No, I do not.

Q Had you ever heard of Ike Smathers prior to this 27th day of September, 1979?

A No, I had not.

Q In regard to the contents of that subpoena and the people named therein, had you ever, prior to the time that you were served with that subpoena, spoken with any police officer, any governmental official, any member of the District Attorney's office or anyone else with regard to the contents of that subpoena?

A No, I had not.

Q Had anybody, prior to delivering that subpoena to you, requested any of the information requested therein?

A No.

Q Would you tell us what happened at the place and time that the subpoena was served upon you?

A Well, I was served the subpoena early the morning of the 27th. I guess around 9:00 o'clock or a few minutes after, and, of course, due to what it said and assuming that

MS. BRYAN:

many, many customers that had nothing to do with the persons' names on the subpoena.

MR. MARTIN:

Q You gave them those?

A They -- When you say give them, I didn't think I had any choice. I didn't just say, "Here is all these cards." They went through and pulled what they felt that they needed.

Q Did the officers push you aside and say, "We are taking over."

A No, they did not. But I assumed this is, you know, I complied with what they said as I felt it should be.

Q Okay, when did you comply with it timewise? I believe you stated it was about 9:00 o'clock when it was served on you.

A Well, they had to bring back someone -- a female officer to go through these records, I believe, when they saw how much it entailed.

Q Did they bring the female officer back at your request or their request or on mutual agreement?

A No. I told him that there was so much involved

that I did not have the time to pull all those records and that if they wanted to stay in the office and go through the stuff themselves, fine.

Q Do you know Captain Jimmy Maxwell?

A I believe that he served a second subpoena on me.

Q Second subponea? Would you describe a second subpoena?

A This one. (Indicating).

MR. MARTIN:

of you were not to disclose this for ninety days?

MS. BRYAN:

A I was upset after they listed my name in here after the things I was told involved these particular people by Mr. Sisson.

Q Yes, ma'am. And you told them about your being upset?

A (Nods head yes).

Q But did you specifically question them, do you recall, about the paragraph that says you are not to disclose the existence of this request for a period of ninety days from the date of this request?

A That was read off to me from the subpoena.

Q Read off to you?

A Yes.

Q You had no questions about that?

A No, I had no questions.

Q There was no exaplanation offered?

A By them to me?

Q Yes, ma'am.

A The discussion of that and so forth is just what it said due to evidence being built and so forth not

to discuss it, I guess so as not to give anybody wind of what was going on.

Q They never told you not to discuss it with Mr. Custer or your attorney?

A They said anyone.

MS. BRYAN:

A Ready.

MR. MARTIN:

Q Please, at anytime you need anything else just interrupt me. This second subpeona, when did you notify Mr. Custer of your having been served with this subpoena, the second subpoena which I --

A The second subpoena?

Q D-2.

A The minute I got it.

Q All right, did you advise the officers that you were contacting your attorney?

A Yes, I did.

Q What, if anything, was their response?

A Their response was -- To my telling them?

Q Yes.

A I told them I wanted to call my attorney, and they said that, well, that wouldn't be necessary, they didn't think that would be necessary because, in fact, I wasn't being put into any position that I should be concerned about.

Q And who told you that?

A I'm not sure which one of the officers told me that.

Q It was one of two?

A Yes, I then called my attorney and he was in Court. I talked with his secretary and told her the situation, and she said, "Well, just don't do anything," and I told the detectives that they would -- that I would not give them

MS. BRYAN:

up his messages, but only Mr. Sacchinelli could let them know what his code is. That is the purpose of coding.

MR. MARGER:

Q Now, is there any question in your mind as to why you gave these messages to Mr. Sisson and the other people from Cobb County?

A I didn't think I had a choice.

Q Because of that subpoena?

A Yes.

MR. MARGER: Thank you, ma'am.

RE-CROSS EXAMINATION: By Mr. Martin

Q But you do not today recall what period of time Mr. Sacchinelli paid you for his services, is that correct?

A No, I do not.

Q You don't know whether it was --

A I'm guessing three or four months.

Q Okay, but you don't know whether it was January or July?

A No, I don't. I'm sorry.

Q And on what number was he paying you?

A 427-6180.

Q And what number did the agents look at for messages?

A 427-0253 and 427-6180.

Q Their main interest was on 427-0253?

A Correct.

MR. MARGER:

Q Now in that regard are you used to seeing subpoenas of this sort issued by your department or otherwise?

MR. HIGHTOWER:

A I know there have been subpoenas of that nature issued in the past, yes.

Q Have you condoned the use of those subpoenas?

A I don't know what you mean by condone. All I know there is no impropriety involved in it. It is basically a security measure in connection with an investigation.

Q So you have absolutely no compunction to have your office use this type subpoena from this day forward?

A No, sir, that is not exactly the case. We have reviewed the situation, in fact, about two or three months ago I think, and, you know, in instances where I think there is an absolute need for security we might still issue some type of John Doe subpoena, but basically any other issuance they are instructed, you know, to use the proper names.

Q If you have a case under investigation can you

deal with the Grand Jury, or is that insufficient security?

A Well, sir, when I talk about security, Mr. Marger, I am talking about from the standpoint -- Of course, a subpoena is in connection with some other entity, whether it be -- I think maybe in this case -- I don't remember from looking at it --maybe Southern Bell Telephone Company or something like the answering service, and if the investigation is a sensitive investigation or major investigation and you have no way of

MR. PIERCE:

A On occasion, yes.

MR. MARGER:

Q Did you have occasion to meet any other members of the family?

A No, sir.

Q Did you ever meet Pam Sacchinelli?

A No.

Q You went to her funeral in Florida, did you not?

A No, sir.

Q Now you are familiar with a subpoena that was issued September 27, 1979, marked as Defendant's Exhibit Number 1.

A This is the first time I've seen it.

Q Were you apprised of its existence prior to coming here?

A Of this subpoena?

Q Yes.

A No, sir, I was not. Not that I can recall.

Q Have you ever seen this document marked D-2?

A No, sir, not that I can recall.

Q Have you ever heard about that subpoena?

A Not that I can recall, no, sir.

Q Did Mr. Sisson ever turn over a file on Frank Sacchinelli to you?

A I saw a report.

Q From whom?

A I believe Mr. Sisson.

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Q A report on Sacchinelli?

A There were some reports regarding some phone numbers, phone messages.

Q What did the report consist of?

A Roughly about -- I think maybe two pages.

Q Were you ever in an automobile with Pam Sacchinelli?

A No, sir, I never seen Pam Sacchinelli.

Q Were you ever in an automobile with Mrs. Pam Sachinelli that was stopped by a police officer?

A No, sir, I was not.

Q Did you ever speak to a police officer in her behalf?

A No,sir, I have not.

Q Now in this file that was shown by Mr. Sisson did it contain a list of telephone numbers?

A Yes, sir, there was a phone number listed on there.

Q Did it contain copies of messages either to or from Mr. Sacchinelli?

A I believe there might have been some on there.

Q Now at the time that you saw the file containing whatever was in it, were you apprised by Mr. Sisson that the materials that were in that file were a result of information given you by an answering service?

A I believe there was some discussion, yes, sir.

Q Well, try and remember the discussion, please, Mr. Pierce.

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A I don't recall word for word. I know -- I believe Sisson related to me where he got the information.

Q Where had he got the information from?

A As far as I knew just from an answering service.

Q Now what happened to those telephone numbers and messages if you know?

A If I know?

Q Yes.

A I don't really understand. Was there an investigation done on them or something like that?

Q Did you continue to investigate Mr. Sacchinelli, or Mr. Sisson just give you these documents in

passing?

A Yes, sir, I continued to investigate. It was just, more or less, was in passing.

Q What did you do, if anything, with the messages and with the telephone calls?

A I retained them and looked over them, looked through them.

Q What did you do with them, if anything?

A Really nothing that I can recall right now.

Q Did you ever check any of the telephone numbers?

A Yes, I believe they were all checked.

Q Who did the physical checking? Who did it? Did you?

A I believe I might have done some. I think other members of intelligence did some of them.

MR. MARGER:

Q Yes.

MR. PIERCE:

A Cocaine overdose.

Q Did you ever lose any cocaine?

A Did I ever lose any?

Q Yes, sir.

A Yes, sir, there was some stolen.

Q Is that the same cocaine that was used by Pam Sacchinelli?

A No, sir, it was not.

Q After you spoke to Sgt. Sisson and got the information, please describe to the Court, if you would, please who did the physical investigation of the specific telephone numbers that were on the list taken from the answering service?

A The best that I can remember I believe I might have done some of them. Maybe Karen Conner might have done some. Sgt. Phillips might have done some.

Q Describe how you did whatever investigation you did from those messages and the telephone numbers?

A To the best that I can remember I believe that

there were numbers wrote out to the different police departments where, say that phone number -- area code number was, asking who the phone was listed to, things of that nature.

Q Do you have some sort of a book -- called a red book, perhaps, in which you can take a telephone number and get a street address and the person to who that telephone is listed?

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A There are some books like that in existence, yes.

Q Did you ever use them?

A I've never really used them. I don't believe they are that accurate personally.

Q How did you find out who actually was the person to whom the specific telephone numbers were listed?

A On out-of-state numbers which, I believe, that either, say, Sgt. Phillips or Ms. Conner wrote letters to agencies within that jurisdiction and asked them to inquire as to who those numbers were listed to.

Q Now did those agencies respond?

A Yes, sir.

Q And in addition to responses as to the owners of the telephones did they also give you any information

as to who those persons were in regard to the criminal justice system?

A Yes, sir, I believe they responded if they had a criminal record or anything.

Q So that from those telephone numbers you got the name of the person to whom the phone was listed and, if applicable, any criminal record that they might have had?

A Yes, if they had any, yes.

Q Did that usually come to you in writing or by telephone?

A Sometimes in writing; sometimes by telephone.

Q Where are the letters or copies that you sent to the

MR. MARGER:

Q And the affidavit was drawn up by you pursuant to the information you had gathered from the various sources, the telephone responses from other police departments and generlly all of the available information that you had; is that not correct, sir?

MR. PIERCE:

A It was wrote up with all the information that I had, yes, sir.

Q Now, the contents of the affidavit which you gave to the Court for the wiretap was the best information you had at that time, was it not?

A Yes, sir.

Q I show you Defendant's Exhibit Number D-11 and ask you if you know what that document is.

A (WHEREUPON WITNESS EXAMINES DOCUMENT). Yes, sir, this is the affidavit for wiretapping.

Q Is that the affidavit which you signed?

A Yes, sir, I recall signing the affidavit.

Q Did you speak to Martin Dartus prior to the time of your signing it?

A Yes, I talked with Mr. Dartus.

Q Was he, in fact, an assistant DA at that time?

A Yes, sir, he was.

Q Now, on page three of the affidavit you stated Mr. Sacchinelli registered at the Ramada Inn in Rooms 206 and 207 on October 31st of 1978, and that there were calls billed to Mr. Sacchinelli.

MR. PIERCE:

say is I have not seen any of this since then. I don't recall any of this. I have not discussed the case with anybody. I have not seen any reports or anything since that time. I'm trying to testify from memory.

MR. MARGER:

Q You said you did not recognize Defendant's Exhibit Number 1 the subpoena of September of 19 --

A No, sir, I did not.

Q But didn't you have anything to do with any subpoenas? Didn't you have anything to do with Ike Smathers?

A Yes, sir, I believe my name is listed on some subpoenas, yes, sir.

Q As a matter of fact, didn't you serve Ike Smathers subpoenas on September 21st, November 15, January 15, January 11th of 1979, and April the 28th of 1980 and 10/30 --October 30th of 1978, Ike Smathers subpoenas?

A It is very possible, yes.

Q Now in regard to this particular case did you not serve Ike Smathers subpoenas concerning Mr.

Sacchinelli on September 21st, 1979?

A I know I served some subpoenas. The exact dates --

Q You and Ms. Conner on the telephone company?

A Yes.

Q How about November 15th, 1979?

A As I stated earlier, Mr. Marger, I know I did. I don't recall the exact dates.

MR. MARGER: Your Honor, rather than take the Court's time at this particular time we would like to go through these because some of these may have relevance. I'm not sure. I haven't had a chance -- We went through the other papers with Mr. McDaniel and we'll either offer them into evidence or return them to Mr. McDaniel.

THE COURT: All right, then, with regard to Mr. McDaniel --

MR. MARGER: There are two questions --

THE COURT: As far as him being the custodian of these records, they are authentic copies of his records, no problem. The only question is whether they are relevant, right?

MR. MARGER: Right.

MR. MARTIN: As to the packet that was previously marked D-13 that's about the only --

MR. MARGER: We'll withdraw for the purposes of this proffer, Your Honor, 13, and may wish to ask the Court to reconsider.

Q (by Mr. Marger) If I may, Mr. McDaniel, I would like to ask two questions. In regard to Ike Smathers

is this something that is strictly Cobb County?

MR. McDANIEL:

A To the best of my recollection it is.

Q Have you discussed with the District Attorney's office

MR. MARTIN:

Q Well, you're the expert.

MR. WILLIAM RILEY:

A If you'll give me the book I'll read you the word.

MR. MARTIN: This is all I have

MR. MARGER: We move he be admitted as an expert in the field of wiretap or electronic surveillance in regard to 18 U.S.C. 2518 and is applicable under the Georgia Statute.

THE COURT: I will let him testify about electronic surveillance and his connection with 18 U.S.C. 2518, but limit him with regard to the State of Georgia.

CONTINUED DIRECT EXAMINATION: By Mr. Marger

Q You have already stated your name and your employment, sir. I show you the exhibit marked 4-C, and ask you whether you have ever seen a copy of that, sir?

MR. RILEY:

A Yes, sir, at approximately one week ago.

Q And, how did you come by that copy?

A Ms. Finkel mailed a copy to me at my office--excuse me, to my home in Miami, Florida.

Q In reading through that, did you recognize any portions of the affidavit as being a case or cases in which you, yourself had been involved?

A Yes, sir.

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Q And, what paragraphs, if any, did you recognize immediately upon reading?

A Beginning on the unnumbered first page of the affidavit, which would be paragraph one, two, three--it would be paragraph three of the first page and continuing through page two in its entirety and through paragraph one, two, three and four on page three.

Q Now, I take it that somewhere along the line you knew a man by the name of Martin Dartus?

A Yes, sir, I have known him for over ten (10) years.

Q On page two of the affidavit, as shown in 4-C, there is a discussion about the Florida Attorney General's Organized Crime Task Force. Is there, to your knowledge, any such organization in Florida?

A Not under the Attorney General's Office, no, sir.

Q Is there or has there ever been an Assistant State Attorney by the name of Martin Dartus?

A Not that I know. The Martin Dartus I know never has been an attorney.

Q You do know a Martin Dartus that was an investigator?

A Yes, sir.

Q And, Martin Dartus did work with you in regard--

MR. MARTIN: I object to the leading nature of the question.

THE COURT: I sustain the objection.

Q Did you ever work with Mr. Dartus on any case reflected

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in this affidavit?

A Yes, sir.

Q Which case or cases?

A It is the case with regard to a Mr. Frank Joseph Sacchinelli and related to October of '78.

Q In paragraph three of this affidavit there is a statement, under oath, that Mr. Sacchinelli purchased one-half of five (5) kelos of cocaine. To your

knowledge, were you involved in the investigation of the accusation against Mr. Sacchinelli, as to the possibility of him purchasing cocaine?

A Yes, I was the co-leader investigator and I was the supervising officer with regard to this portion.

Q Did you work with Investigator Dartus?

A Yes, he was the other investigator.

Q Was he an attorney at that time?

A No, sir.

Q Was he ever an attorney to your knowledge?

A He ain't never been an attorney.

Q During the period of time you worked with Mr. Dartus, did you have all the information available to him, available to you?

A Yes, sir. The information was normally available to me first and Mr. Dartus second.

Q Based on the investigation upon which you and Mr. Dartus worked together, did you ever find that Mr. Sacchinelli

purchased one-half of five kelos of cocaine? I assume that's two and one-half kelos of cocaine on November 1, 1978?

A No, sir, not to my knowledge. If he had he would have been arrested.

Q If Mr. Dartus knew that he had purchased cocaine, would he have arrested him?

A Either Mr. Dartus or myself, or we would have had him set up in such a fashion that Mr. Sacchinelli would have been arrested. The day that Mr. Sacchinelli arrived in Miami I came to the location here, which is not referred to, on the first of November. Mr. Dartus was not even present that day. He was at a meeting.

Q Now, have you ever discussed this case with Mr. Dartus?

A The Sacchinelli case, yes. With regard to what's in the affidavit, no.

Q If--based upon your knowledge of the case of Mr. Dartus and this affidavit,--do you believe this affidavit indicates the truth regarding Mr. Sacchinelli?

A From my own knowledge, no. What Mr. Dartus may have said, I cannot confirm nor deny what he may have told someone.

Q Mr. Dartus is available to the District Attorney's Office, is he not?

A Yes, sir, I believe he has been available since November 1, 1978.

Q He is presently out of the State of Georgia?

A He is retired, yes, sir.

Q Now, are you stating to this Court, under oath, that you had knowledge of Mr. Sacchinelli's activities on November 1?

A Yes, sir.

Q That you had him under surveillance?

A Yes, sir, under physical surveillance and under electronic surveillance.

Q And that you know, from your own knowledge, that at least on November 1, 1978, he did not purchase any cocaine that Mr. Dartus might have had any knowledge about, whatsoever?

A During the period of time that the surveillance was conducted of Mr. Sacchinelli's activities by myself or Mr. Dartus, or other members of our unit, Mr. Sacchinelli did not purchase either five kelos, five grams, or five or anything of cocaine. If he had, we had a plan to have him arrested upon his return to the Atlanta Airport through Mr. Marconi, a D.E.A. agent.

Q Now, in the same paragraph it states not only that Mr. Sacchinelli did purchase half of the five kelos on November 1, but it says that he was to

purchase the remainder the next day. Did he purchase anything the next day, on November 2?

A To my knowledge, no.

Q Was he under surveillance, to your knowledge?

A Specifically, I do not recall whether or not Mr. Sacchinelli came back to our surveillance point on that day. I know there was some surveillance done of him by a member of

MR. RILEY:

Mere association with an individual does not necessarily establish a pattern of conduct. Now, they're saying in this affidavit; this paragraph that his association with a person found not guilty, with a jury no less, was a pattern of bad conduct, that he did something in 1977, and now you're talking about 1978 and now you're talking about 1980 for a wiretap.

MR. SPARKS:

Q However, wouldn't it be pertinent that his Co-Defendant, Mr. Benson, was found guilty on the same charge, the same amount of marijuana and received a prison sentence?

A I'm happy you ask me that question with regard to the affidavit here. Two things in the affidavit, one is that no--I find no showing how the affidavit ties in Mr. Benson with Mr. Sacchinelli and his activities. That's like saying to you, "I know you and one of your friends did something wrong. I must be doing something wrong too because I know you and you know somebody else that did something wrong." You see, you allege here in your affidavit

and then you talk about a man who received five years in prison. Now, your order says to go ahead and intercept his telephone call because he's going to be involved. You have probable cause to believe that according to this affidavit, that Mr. Benson is going to be further involved in committing further crimes. When Mr. Benson was found guilty in 1977 and received a five year prison sentence he would still be in prison on February 26, 1980.

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Q Not necessarily.

A Well, the affidavit doesn't establish that. If you read the affidavit --

Q You know what parole is, I'm sure.

A Your investigator should have put that in here, that Mr. Benson is now out. That's information that's available to anybody. You know, anybody reading it might say he got five years and he's still in, but it don't show in here, no ties to Mr. Sacchinelli. You haven't tied to Mr. Roberts who was found innocent. Now, Mr. Roberts' friend is Mr. Sacchinelli. Mr. Roberts is innocent, but Mr. Roberts' friend by the name of Mr. Benson is guilty. How do you show his guilty friend is tied back to Mr. Sacchinelli?

A Because they were jointly indicted. Wouldn't you say Sacchinelli talks to--theoretically, I mean, circumstantially, to the telephone call, Sacchinelli talks with Roberts. Roberts and Benson are indicted, co-indicated, for the same crime. One is acquitted, the other--A Not acquitted, found innocent by a jury.

Q Acquitted means found guilty, sir.

A Acquitted means found guilty?

Q I said acquitted means found guilty, don't--aren't you familiar with that?

A I didn't know that acquitted meant found guilty.

Q Acquitted, yes--found not guilty.

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A Oh, found not guilty.

Q Found not guilty. One is acquitted, the other is found guilty of the same crime, so they were co-indicted, you don't think that case any inference that Sacchinelli was involved?

A No. You're talking about Sacchinelli going to go get cocaine. Now you're talking about him being involved with a guy with marijuana in 1977 to 1978 and then you don't show that the phone is being used to further any crime.

Q All right.

MR. SPARKS: Go ahead.

RE-DIRECT EXAMINATION: By Mr. Marger

Q In regard to the same paragraph, what does John Daniel Benson sentenced to five years and two years on parole (sic) have to do with an affidavit such as this?

A I find nothing. No association--if he was associating him with Mr. Sacchinelli there maybe something there, something convicing he's a narcotics dealer or--but no apparent association. No pattern.

Q Does the pattern in regard to showing John Daniel Benson getting five years and Mr. Dartus working for the Attorney General's Office have any similarity in their use within the affidavit, based on your experience?

A That's a loaded question, but I'll try to answer it. Similarity, no, because one is misrepresentation and one is a

factor limitation to Mr. Benson's sentence, and if you look at it as a whole it appears you're trying to load up on Mr. Sacchinelli.

Q What do you mean load up?

A Well, flowering up, as Mr. Dartus said, whether

intentionally or not intentionally, and then try to show some part of joint association through Roberts with Sacchinelli and Benson.

Q Now, with regard to the last paragraph on page 4, have you read that?

A Yes, sir.

Q You find anything in the affidavit which connects Mr. Sacchinelli to a DC-3 named in that paragraph?

A No, sir.

Q The DC-3 appeared to have landed in an airport in 1976.

A There were a lot of DC-3's that have landed in a lot of airports in 1976.

Q How, in your opinion as an expert, does that particular paragraph have a bearing in regard to the case in which the affidavit was given to request the warrant?

A Again, I think it is a "flowering up", an attempt to show there is an airpot--a plane landed at an airport with dope in it automatically makes it a "dope airport", and if you took that position you could say every airport in the United States or

probably in the Southeast United States is a dope

airport. For example, I'm sure Mr. Marconi would testify as to a number of dope seizures at the Atlanta Airport. I'm sure the people in Atlanta wouldn't like for it to be called a dope airport or a place where a lot of dope planes come in all the time.

Q Did you find anything in the affidavit that in any way ties up 2,500 pounds of marijuana, as in that particular paragraph, to Mr. Sacchinelli?

A None, no association, at no--no type of association whatsoever.

RE-CROSS EXAMINATION: By Mr. Sparks

Q Let me ask you a couple of questions. I'll try to speed this up. You don't find any probative evidence or probable cause or indication of probable cause in the fact that a plane was ceased at the west--at West Georgia Regional Airport in Carrollton, Georgia, with 2,500 pounds of marijuana? The fact that the affiant himself, the officer; Mr. Pierce, working in an undercover capacity, has learned that West Georgia Airport is frequently used for dope smugglers to fly in shipments of illegal drugs and narcotics, and the fact that Mr. Sacchinelli has made numerous calls from his apartment to Atlas Company; which is stationed there at the same airport, that

doesn't give you any indication that--

A I find the same coalition when you, yourself, calls

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Delta Airlines at the Atlanta International Airport to make reservations to fly out. Am I saying your going to the Atlanta Airport where a lot of dope coming in there, that you're involved in dope smuggling? Is it a crime for a man to call an airport? Now, if you tie it in, maybe the airport and the business that the man was calling and you tied that business into illegal activity and you tied the individual that was calling into illegal activities, you might have something there, but you--it's not tied in.

Q It is true, the first paragraph on the next page, is it not, sir? It says the affiant has had conversations with people know by him to be dope smugglers or drug smugglers. It's been stated, "Atlas Aviation performs maintenance and provides storage for such planes, referring back to aircraft smuggling in quantities of illegal drugs.".

A I use the same thing with Delta Airlines. People have performed maintenance on 747 and L1011, are they dope airlines too?

Q You've kind of changed your viewpoint since

you were an officer trying to vary out drug smugglers, haven't you?

A Not necessarily, I don't believe in drugs.

Q Sir?

A I do not believe in drugs. I'm looking at a factual situation. You ask me what the association was. I'm not giving you my viewpoint on narcotics, right or wrong or constitutionality.

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I'm going on an affidavit here with some facts in it.

MR. SPARKS: No further questions on this point.

RE-DIRECT EXAMINATION: By Mr. Marger

Q In regard to this affidavit, have you gone through and analyzed those portions which are substitive as opposed to those portions of the affidavit which you have found to contain no relative information whatsoever to the activities of Mr. Sacchinelli?

A Yes, sir.

Q What were--

A I'd like to finish my last answer to this gentleman over here. You were asking me about the airport situation. If you go down to the next

paragraph on page 5, "the affiant further shows that numerous telephone calls were made." If you're not going to say when the phone calls were made--there's no showing when these phone calls were made. They may have been made in 1951 or 1942, or they might have been made in 1973, there's not showing that it's an ongoing, continuing pattern. He might have called out there five times. That might have been a numerous amounts of time, but you don't show any time pattern as to when the undercover agent learned that this airport was a big dope airport. Were these calls made along that time or were they made prior to it or made after it? Were these phone calls made

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around the time when the DC-3 was brought in? If it was you might have some type of association where one man would believe, okay, the DC-3 is standing here, Atlas is using it, and right around the time this is all being done Mr. Sacchinelli was calling out to Atlas everyday, five times a day, a reasonable man might believe that the man is doing something, probably.

RE-CROSS EXAMINATION: By Mr. Sparks

Q You're probably coming around to my way of

A No, the paragraphs here though, you don't show a date, but you're saying he made calls out there. What association is there? When were the calls made, sir?

Q Don't you think the position in the affidavit indicates that it follows the information that the affiant got during his undercover capacity about Atlas?

A No, because he jumps around all over the affidavit. The first page of the affidavit is 1978, now we have reverted back to 1977, and then in a couple of minute we're going to jump back to 1979 at the bottom of the page. So, you don't really know. The affiant doesn't go in chronological order, starting off with 1977, 1978. You don't make any pattern. He goes here and yonder, '78, '77, '79, no pattern. There's no association, no pattern, no course of conduct.

Q There's a lot of suspicion, isn't there, in this

THE COURT:

to present anything in rebuttal? I just want to be sure we've gotten to the end.

MR. SPARKS: Yes, sir, we're at the end.

THE COURT: Okay. Now, the State gets the right to make the opening and closing final argument and I'm going to let you argue about all aspects of it.

MR. MARGER: Is the witness excused?

MR. SPARKS: He's excused I guess.

THE COURT: Okay, you're free to go, Mr. Riley.

(WITNESS IS EXCUSED)

THE COURT: Judges, perhaps too, are not without their running hands dilemas. I mean, you know, the Ike Smather's subpoena is illegal, you know. There is no question about it. It is issued--no doubt, people get in the habit, I guess, of the subpoena being issued in blank, and they have got a tool available to them and then they use that without--for an invalid purpose. And there is no question about it. It does carry the language on there not to--it goes further. The Supreme Court cases--I look at

that Miller case, and I couldn't

believe I'd find a case, but then I look at the Miller case and there's a case that's on invalid subpoenas, you know, out of the State of Georgia to get the guy's bank records. And, I feel like that in one of the other cases--if I can locate it--then the pen register case from the Northwest Answering Service, you know, it looks to me like the Miller case would say that Mr. Sacchinelli doesn't have any standing to object because it's an intrusion on a third person. And it's going to be difficult to fashion some type of remedy that will put an end to the Ike Smather's subpoenas situation that will pass on a message to them that they have got to quit doing it. Maybe a Grand Jury subpoena is allowable. I'm not that familiar with that, that it is not proper and it is not allowable. But, in that situation I think that probably it's a Sharon Bryan. There is a communication from a third person to the operator. And, it's interesting in Smith versus Maryland, in the pen register case, it says in there that--in the petitioner in his brief,